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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 413

GREENBELT COOPERATIVE PUBLISHING ASSOCIATION, INC., and ALFRED M. SKOLNIK,

Petitioners

v.

CHARLES S. BRESLER,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

REPLY BRIEF FOR PETITIONERS

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I

In a telling acknowledgment of the complete lack of substance to the central holding below that petitioners knowingly charged him with the crime of blackmail, Bresler's brief (pp. 3-8) attempts to shift the focus of the case to other articles which, with one exception discussed

in the next paragraph, were not in issue or received little or no attention at the trial.[1]

Thus, Bresler claims that there was "a series of libelous attacks" (p. 3), that "[s]everal of the 45 exhibits placed in evidence were knowingly false reports of lawsuits. . . which pertained solely to his *private* activities as a builder" (p. 4), and that there were "numerous other publications which were intended. . . to injure him in his business". (pp. 7-8) The only article in issue cited in support of these assertions, which received any attention at the trial, was the article of June 9, 1966 relating to Bresler's candidacy for State Comptroller (Pl. Ex. 6, E. 222-3, Tr. 40). The statement in issue in that article—that a number of homeowners in the community had started legal proceedings against Bresler for failure to make construction corrections in their homes—directly related to his qualifications as a candidate for Comptroller.[2] The background and import of this statement—and the clear insufficiency of the evidence with

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[1] The Court of Appeals clearly focused on the "two principal articles which used the word 'blackmail' . . . . [as forming] the principal basis for the libel action." (E. 266, 269) Bresler also attempts to shift the focus within one of these articles from "blackmail" to "skulduggery" which was a fair and accurate condensation of criticism voiced at the City Council meeting concerning official action taken by the School Board in postponing its condemnation action against respondent (E. 42-3, 152-3, 162-3). Bresler's main contention (pp. 9-10) seems to be that this word is actionable, regardless of its undisputed accuracy as a condensation, simply because it was inserted during the editing process. There was no showing at the trial that this portion of the article was false, that it even referred to Bresler, or that petitioners entertained any doubt as to its accuracy at the time of publication.

[2] As stated in *Garrison v. State of Louisiana*, 379 U.S. 64, 77 (1964), "anything which might touch on an official's fitness for office is relevant." *Accord, Goldwater v. Ginzburg*, 414 F.2d 324, 335 (2d Cir. 1969), *petition for cert.* filed Oct. 2, 1969, No. 687.

respect thereto to establish actual malice under the constitutional standard—is fully discussed in petitioners' brief, pp. 9-10, 28-31.[3]

The only other publications in issue cited in Bresler's brief (pp. 3-8) to support the assertion that there was a "series of libelous attacks" are three letters to the editor expressing critical opinions of his public dealings with city and county officials regarding such clear public issues as the high school site and the covenants. No attempt was made to show that these letters were in any way false. Indeed, the two strongest letters—entitled "An Unethical Trade" and "Another Crippling Blow" (Pl. Ex. 1, E. 214-5, Tr. 39; Pl. Ex. 3, E. 220, Tr. 40)—were not even mentioned at the trial. The third letter was given only perfunctory attention (E. 48-9).

II

Bresler's heavy reliance (pp. 10-2) upon the News Review's publication—eight months after the articles in which the word "blackmail" appeared—of two short press releases concerning the CFPG legal fund highlights the extent to which distant and unrelated conduct of petitioners was relied upon below as establishing actual malice.[4] Moreover, Bresler misreads Justice Harlan's opinion in *Butts* in suggesting (pp. 17-9) that it would allow recovery based on such

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[3]Bresler also attempts (p. 7) to shift the focus within this article to another statement which was not even alleged to be libelous in the declaration. Bresler's assertion in this connection that Mr. Skolnik knew that an earlier suit by the City against one of Bresler's corporations had been dismissed is a gross distortion of the record (E. 57-8).

[4]Not only do these two short articles fail to establish News Review "sponsorship" of the citizens' lawsuit against Bresler, but, as pointed out in petitioners' brief (pp. 13-4), the claim that they "misrepresented" the purpose of the fund drive is patently without merit.

evidence. The constitutional standard for recovery by public figures advocated by Justice Harlan, like the *New York Times* rule adopted by the majority, focuses on the conduct of the defendant *in publishing the articles in issue.* It clearly would not permit recovery by a public figure on the basis that a newspaper had opposed his actions with respect to public issues on other occasions.

III

Bresler argues (pp. 14-5) that petitioners "took the word 'blackmail' out of context in the first article and featured it as a caption in heavy type." This caption was merely one of a series of sub-heads in the article designed to break up the long columns of type by accurately describing the substance of what immediately followed (Ex. 1, E. 211-2, Tr. 39; E. 158). Moreover, it in no way over-emphasized the extent to which the word "blackmail" was used or distorted the tenor of the public reaction at the meeting to Bresler's zoning proposal. As stated by the reporter: "[t]he people were really mad and that word 'blackmail' was not used once or twice like in my story, but over and over and over again."[5] (E. 166)

IV

Bresler's claims (pp. 16-7) that petitioners failed to raise a separate public figure defense or to request a proper instruction thereon were not raised in the trial court and were ignored by the Court of Appeals. They are without merit. In anticipation of the decisions of this Court in *Butts* and *Walker*, petitioners' constitutional defense clearly referred to Bresler's status both as a public official and as "an

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[5] As stated by the Mayor: "Certainly nothing in here that reports the meeting any different from the way it happened." (E. 121)

active participant in matters of pressing public concern to which the publications complained of were directed".[6] (E.6) On the basis of this defense, petitioners requested instructions that the articles were actionable only upon a showing of knowing falsity or recklessness under the *New York Times* standard (E. 8-9). After these requests were rejected, petitioners repeatedly attempted to get a correct statement of the public figure aspect of the constitutional protection (E. 206, 208).

V

Bresler attempts (pp. 23-4) to gloss over the fact that seven out of eight instructions incorrectly stated the *New York Times* rule as to actual malice on the basis that "the court reporter designated the trial court's pauses with a comma instead of a dash." As clearly shown in its colloquy with counsel set forth in petitioners' brief at pp. 16-7, however, the trial court's pauses, and its omission of the words "that is" after the word malice, were intended to convey to the jury its view of the law that actual malice, which it defined as "spite, hostility or deliberate intention to harm," was separate and distinct from knowing falsity or reckless disregard of the truth. The cumulative impact of these and the other clearly erroneous instructions on actual malice was hardly cured by the perfunctory instruction which the court finally gave on the *New York Times* rule.

VI

Finally, Bresler argues (pp. 25-6) that he did not have an opportunity to rebut the criticism of him in the News Review. The fact is that Bresler did not even complain to the News Review regarding the articles in which the word "blackmail" appeared until he filed this suit some nine months later (E. 156, 162) when the News Review's accurate criti-

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[6] Bresler's concession in his opening statement (E. 19) that he was a public figure demonstrated that he understood at the trial that the public figure aspect of the constitutional defense was in issue.

cism with respect to the covenants threatened his campaign for Comptroller. Thus, quite apart from Bresler's obvious access to other media as an important political figure and major land developer whose business activities alone commanded feature coverage in The Washington Post, there is no evidence that he was ever denied access to the News Review itself.[7]

Respectfully submitted,

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[7] As shown in the report of the second city council meeting (Pl. Ex. 2, E. 216, Tr. 39) and by the article cited on p. 4 of Bresler's brief, the News Review did not hesitate to print criticism of itself. The paper also had a liberal policy on printing letters to the editor (E. 159-60) and on at least two occasions it affirmatively sought out Bresler to obtain his views (E. 23-4, 74).